UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCKENZIE-WILLAMETTE REGIONAL MEDICAL CENTER ASSOCIATES, LLC d/b/a MCKENZIE-WILLAMETTE MEDICAL CENTER	:	Case Nos. 19-CA-077096 19-CA-095797
and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 49, CTW-CLC	:	

RESPONDENT'S MOTION TO RECUSE BOARD MEMBER KENT Y. HIROZAWA

As the Respondent in the above-captioned cases, McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center (hereafter, "McKenzie-Willamette" or the "Hospital") hereby requests, by and through the Hospital's Undersigned Counsel, that the National Labor Relations Board (hereafter, the "Board") issue an Order recusing Board Member Kent Y. Hirozawa from exercising any and all powers and performing any and all functions provided for in Section 10 of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, *et seq*. (hereafter, the "Act"), and in the Board's Rules and Regulations, 29 C.F.R., Chapter I, *et seq*., related to the above-captioned proceedings.

BACKGROUND

1.) The Present Unfair Labor Practice Proceedings

Based upon Unfair Labor Practice Charges filed by the Charging Party, Service Employees International Union, Local 49, CTW-CLC (hereafter, the "Union"), on February 19, 2013, the Acting General Counsel (hereafter, for ease of reference, the "General Counsel") issued a Consolidated Complaint (hereafter, for ease of reference, the "Complaint") in which he alleged that the Hospital violated Sections 8(a)(5), and derivatively, 8(a)(1) of the Act by refusing to provide the Union with information that related to a grievance the Union filed on behalf of employee Melissa Frost. See Case No. 19-CA-077096. The Complaint also alleged the Hospital violated Sections 8(a)(5), and derivatively, 8(a)(1) of the Act by refusing to provide information purportedly related to health insurance that the Hospital offers to the employees represented by the Union. See Case No. 19-CA-095797. In response, McKenzie-Willamette filed a timely Answer, whereby the Hospital denied the material allegations of the Complaint and set forth several Affirmative Defenses.

A hearing took place on March 12, 2013 in Eugene, Oregon before Administrative Law Judge Gerald Etchingham (hereafter, the "Judge"). On June 3, 2013, the Judge issued a Decision (hereafter, the "Decision")

whereby he found that McKenzie-Willamette had violated the Act as alleged by the General Counsel. In response to the Decision, the Hospital filed with the Board timely Exceptions, which remain pending before the Board.

2.) The Grounds for Member Hirozawa's Recusal

For purposes of the above-captioned cases, McKenzie-Willamette has been represented by the Undersigned, Don T. Carmody. In 1997, proceeding *pro se*, the Undersigned brought a civil action in New York State Supreme Court, Ulster County, against, amongst others, the Communication Workers of America. See Index No. 000740 / 1997. The Defendants were represented by now-Member Hirozawa, who, on the Defendants' behalf, interposed and prosecuted counterclaims against the Undersigned.[1] Member Hirozawa also took, over the course of several days, the Undersigned's deposition. The litigation, which was ultimately dismissed because of a dispute over discovery, was acrimonious, as Member Hirozawa repeatedly accused the Undersigned of not acting in good faith.

ARGUMENT

1.) Member Hirozawa Should Be Recused Under 28 U.S.C. § 455(a), Because A Reasonable Person Would Question His Impartiality

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[1] At the time of the litigation, Mr. Hirozawa was a member of the law firm Gladstein, Reif & Meginniss, LLP.

[2] See also Caterpillar, Inc., 321 NLRB 1130, 1133 (1996) (decision vacated 1998) (where in a response to a recusal motion, Chairman Gould stated that "I take seriously the standards applicable to judges and believe that my

Because of the prior dealings between the Undersigned and Member Hirozawa, by operation of statute, Member Hirozawa must be recused from any consideration of the consolidated action now before the Board. 28 U.S.C. § 455(a) requires that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Significantly, this provision "governs circumstances that constitute an **appearance of partiality**, even though actual partiality has not been shown." Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2004) (emphasis added). The standard is an objective one that evaluates whether a reasonable, objective observer who knows and understands all the facts would question the impartiality of the judge. See SEC v. Loving Spirit Found. Inc., 392 F.3d 486, 494 (D.C. Cir. 2004).

Although this statute applies on its face only to federal court adjudicators, the Board has applied these same standards to members of the Board. Overnite Transp. 329 NLRB 990, 999 (1999); Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 238-39 (3d Cir. 1941); cf., Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) (where the Court held that recusal standards for administrative agency officials are analogous to those governing federal

judges, which are delineated in 28 U.S.C. § 455).[2] Application of § 455(a) to the Board makes eminent good sense, as the purpose of the statute, which is promoting confidence in the impartiality of the federal judiciary, should apply equally to the Board. Indeed, the Supreme Court has stated, "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 (1988).

The history between Member Hirozawa and the Undersigned creates, at a minimum, an appearance that Member Hirozawa may not evaluate the Hospital's arguments with total impartiality. The simple fact that Member Hirozawa represented parties against whom the Undersigned previously brought a civil action ought to be reason enough for the Board to order his recusal. However, the prior litigation that the Undersigned brought against Member Hirozawa's clients involved special considerations. Specifically, due to the fact that, for most of the litigation, the Undersigned proceeded *pro se*, Member Hirozawa and the Undersigned had countless, direct interactions, both over the phone and through written correspondence. Many of these interactions were heated and included allegations from

[2] See also Caterpillar, Inc., 321 NLRB 1130, 1133 (1996) (decision vacated 1998) (where in a response to a recusal motion, Chairman Gould stated that "I take seriously the standards applicable to judges and believe that my participation in these cases conforms with such standards").

Member Hirozawa that the Undersigned brought the action in bad faith and/or had prosecuted the action in bad faith. The Undersigned's deposition, which involved several days of face-to-face interaction with Member Hirozawa, was especially contentious. In view of these facts, a reasonable person would at least question Member Hirozawa's impartiality, and similarly, harbor concern as to whether the prior litigation would tend to prejudice the rights of the Hospital. See 28 U.S.C. §455(b)(1) (an adjudicator should be recused based upon "personal bias or prejudice concerning a party"); see also Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996). In the event the Board were to view the question of whether § 455(a) requires Member Hirozawa's disqualification as a close one, the balance unquestionably tips in favor of recusal. United States v. Dandy, 988 F.2d 1344, 1349 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994).

2.) Member Hirozawa Should Be Recused Under The Ethical Standards For Employees of the Executive Branch, Because A Reasonable Person Would Question His Impartiality

Member Hirozawa's recusal is also necessary under the Standards of Ethical Conduct for Employees of the Executive Branch set forth in Title 5 of the Code of Federal Regulations. 5 CFR § 2635. The relevant sections provide:

> Sec. 2635.101 Basic obligation of public service.
> ….

> (b) General principles . . .
> ….
> (8) Employees shall act impartially and not give preferential treatment to any private organization or individual
> ….
> (14) Employees shall endeavor to avoid actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

The comments to Section 2635.501 make it clear that considerations of impartiality must be determined by looking at whether a reasonable person with knowledge of the facts would question an executive employee's impartiality. Therefore, a Board member must be recused if a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. For the reasons set forth above, the Board is faced with at least the appearance of Member Hirozawa's lack of impartiality, which violates the ethical standard to which Member Hirozawa is subject as an employee of the Executive Branch. Any reasonable person could find Member Hirozawa would give preferential treatment to the General Counsel and/or the Union due to the prior, extensive litigation that featured the Undersigned squaring off against Member Hirozawa. It should also be noted that, whereas Member Hirozawa's recusal would protect the Hospital from a lack of impartiality,

neither the General Counsel nor the Union would suffer any related prejudice.

CONCLUSION

For all the reasons set forth above, the Hospital respectfully requests that the Board order Member Hirozawa's recusal for all purposes related to the cases now before the Board. Alternatively, to the extent the Board does not believe that Member Hirozawa should be recused based upon the showings above, the Hospital respectfully requests, pursuant to Section 102.50 of the Board's Rules and Regulations, that the Board schedule an evidentiary hearing before the Board.

Dated: December 31, 2013
Brentwood, Tennessee

Respectfully submitted,

/s/_____

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CERTIFICATE OF SERVICE

The Undersigned, Don T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on December 31, 2013, a copy of the Respondent's Motion to Recuse Board Member Kent Y. Hirozawa was served upon the following by email:

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Dated: December 31, 2013
Brentwood, Tennessee

Respectfully submitted,

/s/_____

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